# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Buchanan-Davies v Broadbent & Anor [No 2]* [2011] QSC 148 |
| PARTIES: | **BUCHANAN-DAVIES, Deborah Kathryn**<br>(applicant/plaintiff)<br>**v**<br>**BROADBENT, Michael Russell Mark**<br>(first respondent/first defendant)<br>**ALLAMANDA PRIVATE HOSPITAL PTY LTD**<br>ACN 098 641 564<br>(second respondent/second defendant) |
| FILE NO/S: | SC No 9312 of 2008 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 3 June 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 9 December 2010<br>21, 28 January 2011, 11 February 2011 |
| JUDGE: | Atkinson J |
| ORDER: | **The respondents pay the applicant's costs of and incidental to the application to be assessed.** |
| CATCHWORDS: | PROCEDURE – COSTS – RECOVERY OF COSTS – where the applicant was successful in an application to extend the time to commence proceedings to recover damages for personal injuries – where the applicant sought an order for costs on an indemnity basis for a fixed amount – whether the applicant should be awarded indemnity costs – whether the quantum of costs should be fixed or assessed<br><br>*Limitations of Actions Act* 1974 (Qld), s 11, s 31(2)<br>*Uniform Civil Procedure Rules* 1999 (Qld), r 681(1)<br><br>*Australian Securities Commission v Aust-Home Investments Ltd & Ors* (1993) 116 ALR 523, cited<br>*Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359, cited<br>*Blundstone v Johnson & Anor* [2010] QCA 258, cited<br>*Donald Campbell & Co v Pollak* [1927] AC 732, cited<br>*Jones v Millward* [2005] 1 Qd R 498, cited<br>*Ketteman v Hansel Properties Limited* [1987] AC 189, cited<br>*Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337, cited |

*The Commonwealth v Verwayen* (1990) 170 CLR 394, cited
*Vision Gateway & Anor v Moretonsoft Pty Ltd & Ors* [2009] QCA 312, cited

COUNSEL: G Mullins and B Wessling-Smith for the applicant
GW Diehm SC for the first respondent

SOLICITORS: Maurice Blackburn Lawyers for the applicant
Flower & Hart Lawyers for the first respondent
Minter Ellison Lawyers for the second respondent

[1] The applicant, Deborah Buchanan-Davies, was successful in an application to extend the time for the commencement of proceedings claiming damages for personal injuries against the first and second respondents pursuant to s 31(2) of the *Limitations of Actions Act* 1974 (Qld) ("the Act").

[2] The judgment was delivered on 18 November 2010 and the parties were invited to make submissions as to costs.

[3] The applicant/plaintiff sought an order for costs against each of the first and second respondents:

(a) on an indemnity basis for the fixed amount of $28,575, being $25,000 for solicitor's fees and outlays and $3,575 for counsel's fees; or
(b) to be assessed on the indemnity basis; or
(c) on the standard basis fixed at $14,675; or
(d) to be assessed on the standard basis.

[4] The first respondent submitted that the appropriate order is that there be no order as to costs or that the costs should be the parties' costs in the cause. The second respondent sought an order that the costs be the parties' costs in the cause.

[5] The general rule as to costs in the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") is found in r 681(1) which provides:

> "Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise."

[6] Whilst the discretion to grant costs is unlimited except to the extent set out in the UCPR, it must be exercised judicially: see *Donald Campbell & Co v Pollak* [1927] AC 732 at 811-812; *Australian Securities Commission v Aust-Home Investments Ltd & Ors* (1993) 116 ALR 523 at 528; *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359 at 362.

[7] The usual principle is that costs are ordered on the standard basis:

> "Costs are of course a matter which lies in the discretion of the court. However, that discretion, being a judicial, rather than an unfettered one, must be exercised in accordance with established principle. The usual principle to be applied in inter partes litigation is that costs follow the event, those costs being taxed on a party and party basis."[1]

**Indemnity costs**

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1 *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* at 362 per Powell J.

[8] In *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337, Cullinane J, with whom Muir JA and Ann Lyons J agreed, reviewed the authorities with regard to indemnity costs. His Honour held at [42] – [47]:

> "The normal order for costs is on the standard basis and some special reason is required for any departure from that.
>
> Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 discussed the subject generally and identified categories of cases in which it would be appropriate to make such an order. These categories were not meant to be exhaustive:
>
> > 'Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in Fountain and also by Gummow J in Thors v Weekes (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in Tetijo); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in Ragata) or in wilful disregard of known facts or clearly established law (Woodward J in Fountain and French J in J-Corp (supra)); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davis J in Ragata); an imprudent refusal of an offer to compromise (eg Messiter v Hutchinson (1987) 10 NSWLR 525; Maitland Hospital v Fisher (No 2) (1992) 27 NSWLR 721 at 724 (Court of Appeal); Crisp v Kent (unreported, Court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27 September 1993) and an award of costs of an indemnity basis against a contemnor (eg Megarry V-C in EMI Records (supra)). Other categories of cases are to be found in the reports.'
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> In *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, the New South Wales Court of Appeal sounded a cautious note at 616:
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> > '… the Court requires some evidence of unreasonable conduct, albeit that it need not rise as high or vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity. Any shift to a general or common rule that indemnity costs should be the order of the day is a matter for the legislature or the rule-maker.'
>
> In *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359, Powell J expressed the view that an order for indemnity costs was warranted where in effect the proceedings had no reasonable prospect of success.

> Rolfe A/JA (as he then was) in *Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242 at 273 after reviewing the authorities said:
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> > 'In my opinion the authorities support the proposition that where a party persists in a hopeless case, that justifies, for all the reasons given, the making of an order for costs on an indemnity basis.'
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> See also cases such as *Di Carlo v Dubois & Ors* [2002] QCA 225."

**Indemnity costs – applicant's submissions**

[9] The successful applicant applied for indemnity costs on the basis of an offer made by her and on the basis of what is alleged to have been unreasonable continuation of the defence and unreasonable conduct.

[10] As to the offer to settle, the applicant submitted that:

> "On 5 March 2010 [she] made an offer to both Respondents to settle the application on the basis that each party bears their own costs, and the Respondents accede to an order being made pursuant to section 31.
>
> That offer was made more than one month prior to the hearing of the subject application. At the time of that offer being made, the Respondents had been provided with all of the affidavit evidence intended to be relied upon by the Applicant.
>
> The offer to settle, which forms Annexures SRH2 and SRH3 to the affidavit of Ms Hobill mirrors to a large extent the findings made by this Court as to the existence of a reasonable fact of a decisive character, namely the expert evidence pointing to negligence on the part of the first Respondent and as to prejudice.
>
> Acceptance of that offer would have meant that the Applicant was willing to bear her own costs in respect to the application, and in effect there be no order for costs. Importantly, acceptance of that offer would have brought about precisely the result achieved, namely an extension of the limitation period. Acceptance of that offer would also have brought about a resolution of the application prior to the Respondents undertaking the significant work associated with putting evidence before the Court.
>
> This offer represents a real benefit to the Respondents, which was refused by them. The benefit is that, had the offer been accepted, at no stage would the Respondents have to bear the Applicant's costs with respect to the application. That is a significant benefit where the costs order is either an order that the Respondents pay the Applicant's costs of the application, or the order is that each party's costs be costs in the cause where there is a prospect that in the future, where the Applicant is successful against the Respondents, it will be required to pay those costs. …

> Although the offer was strictly not an offer to settle made under Chapter 9 Part 5 of the Rule because it did not include a statement that it was made under that Part, having regard to the principles espoused in *Cussons* … it is submitted in circumstances where the Applicant achieved a better outcome than the offer made one month prior to the application and acceptance of that offer would have obviated the need for a hearing in respect to the Applicant in this matter, the refusal of such an offer was unreasonable and, in the absence of countervailing circumstances, an order for indemnity costs ought be made."

[11] In support of her contention that there was unreasonable conduct and unreasonable continuation of the defence, the applicant submitted that:

> "The second Respondent defended the application solely on the basis of prejudice. This was only notified to the Applicant on day one of the application, 6 April 2010.
>
> The Court held that the records kept and disclosed by the second Respondent were comprehensive, and the medical chart included detailed and extensive notes made by the nursing staff.
>
> The expert relied upon by the Applicant, namely Ms Sharp, was not specifically cross-examined about her report with respect to the Applicant.
>
> The allegation of prejudice was made on the basis of the evidence of Judith Bryceson, Christine Samin Elizabeth Sellars, Sharan Goss and Sheena Nuttall.
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> Ms Sellars had no independent recollection of the applicant beyond her name. She did not recall and concern about her however if there was she would have contacted the treating doctor and made a note in the chart. The notes reflected a thorough summary of the treatment provided, medications dispensed, and nursing care given. Anything of significance would have been recorded in the notes. This was her general practice and she could not say if something was missing from the notes.
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> Ms Goss's evidence was similar to Ms Sellars however she had no recollection of the applicant at all.
>
> Ms Nuttall also had no independent recollection but could remember the first Respondent's pre-operative requirements and hospital procedures. The notes reflected a thorough summary of the treatment provided, medications dispensed, and nursing care given. Anything of significance would have been recorded in the notes.
>
> Ms Bryceson had no independent recollection of the applicant beyond her name. She did not recall and concern about her however if there was she would have contacted the treating doctor and made a note in the chart. The notes reflected a thorough summary of the treatment provided, medications dispensed, and nursing care given. Anything of significance would have been recorded in the notes. She

could not say if something was missing from the notes but this might have been possible.

The affidavits of Ms Goss, Ms Bryceson and Ms Nuttall were sworn 30 March 2010 and only served on the Applicant's solicitors on Tuesday, 30 March 2010 and Wednesday 31 March 2010, varying between one and two clear business days prior to the scheduled application. This was despite the solicitors for the second Respondent knowing, by 21 December 2009, that the application was scheduled for 6 to 9 April 2010.

The affidavit of Ms Sellars was sworn 27 March 2010 and served 29 March 2010.

The affidavit of Ms Samin was served, unsworn on Thursday 1 April 2010 at 4.26 PM leaving the applicant's legal representatives no clear business days to review it.

Another nurse involved in the care of the Applicant, namely Tanya Banks Hansen, did not give evidence. The second Respondent did not hold any contact details for her, as they were agency nurses. Request was made through the Queensland Nursing Council for their contact details. That request was made on 29 March 2010 and, perhaps unsurprisingly, no response was received by 30 March 2010. As at the date of hearing the solicitors had not yet asked the second Respondent for the name of the agency that they used, nor contacted the agency for whom they worked.

The factors that persuaded the Court that any potential or actual prejudice is not significant were matters that ought to have been well known to the second Respondent since the initial notice was served on the second Respondent on 17 December 2007. In this matter this included knowledge on the part of the second Respondent that the applicant was concerned about her discharge from the hospital with post-operative complications from November 2003 and an investigation had been conducted at that time.

In the circumstances, it is submitted –

- the decision, namely that there was insignificant prejudice, was hardly surprising and, it is submitted, moreover was the only decision likely to be made by the Court;

- the evidence in support of the defence mounted by the second Respondent was in the second Respondent's possession and control for the some 2.5 year period between the service of the initial notice of claim and the hearing of these applications;

- more particularly, the second Respondent required the Applicant to make an application pursuant to s 31 of the *Limitations of Actions Act* (Qld) 1974.

> In the circumstances, it is submitted that the maintaining of the defence of prejudice was unreasonable in the circumstances, as was the second Respondent's conduct in defending the application, namely the late disclosure of documents and affidavit material sought to be relied on, which is deposed to in the first affidavit of Ms Hobill at paragraphs 32 to 42."

**Indemnity costs – first respondent's submissions**

[12] As to the application for indemnity costs, the first respondent submitted that the correspondence addressed a number of issues in favour of the applicant for the obtaining of an extension of time and proposed that the applicant have the ultimate relief sought by her and that there be no order as to costs.

[13] The first respondent submitted that whilst the letter addressed generally the issue of "means of knowledge" it did not address the particular issues which were relied upon by the first respondent. The basis for the opposition to the application was certain discreet "facts" which emerged from various contemporaneous documents which gave rise to reasonable arguments, even though ultimately rejected, that the applicant possessed the means of knowledge of the material fact of a decisive character relied upon. Given that for each side the outcome was "all or nothing" it was unsurprising the first respondent said, when there was an issue of substance, that the hearing proceeded. The first respondent submitted that given the nature of the claims as to damages made, and the uncertainty that the applicant would in any event be entitled to an order for costs if successful, the offer could not be described as a "compromise" at all.[2]

**Indemnity costs – second respondent's submissions**

[14] The second respondent, in very extensive submissions which it is not necessary to reproduce here, submitted that while a court may award indemnity costs, indemnity costs is an extraordinary order and cases warranting such an order fall within a "narrow category".[3]

**Discussion**

[15] I agree with the respondents' submissions that the question as to whether or not an award of indemnity costs ought be made cannot not simply be answered by whether there was an offer made which was more advantageous to the respondents but which was rejected by them. The question is whether, in the circumstances of the offer having been made, the respondents' continued opposition to the application was so unreasonable as to warrant an order for indemnity costs being made against them. In *Blundstone v Johnson & Anor* [2010] QCA 258, it was held that the applicant's pursuit of an application for leave to appeal in the face of a *Calderbank* offer was, even though ultimately fruitless, not so unreasonable as to warrant an order for indemnity costs. Holmes JA held at [5] and [7]:

> "The applicants are right in contending that the refusal of a *Calderbank*-type offer of compromise would not inevitably result in an order for indemnity costs. Such orders require some unusual feature to justify them; for example, that the 'conduct of the party

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2 *Jones v Millward* [2005] 1 Qd R 498.

3 *Vision Gateway & Anor v Moretonsoft Pty Ltd & Ors* [2009] QCA 312 at [9] per McMurdo P.

> against whom the order is sought is plainly unreasonable' or falls within one of the particular categories of misconduct identified by Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd*.
> …
> … it cannot be said that the applicants' arguments were entirely without merit, although they were not, in the event, accepted. The case does not possess the unusual feature or features which would justify the court from departing from the usual order for costs." [footnotes omitted]

[16] There is not in my view sufficient in this case to warrant an order for indemnity costs against the respondents. Although they were unsuccessful, their arguments were not entirely lacking in merit or unreasonably made.

**Standard costs**

[17] The next question then is whether there ought be an order for standard costs in favour of the applicant. Whilst it is arguable that the applicant needed to make the application to be given leave, the defence is not one which applies unless the point is taken by the defendants.

[18] The defence under s 11 of the *Limitation of Actions Act* 1974 (Qld) entitles a defendant to plead, as a defence, that the plaintiff's action is statute barred. If the defendant elects not to plead that defence, the plaintiff is not required to make an application to extend the limitation period.

[19] As Mason CJ held of the Victorian equivalent to s 31(2) in *The Commonwealth v Verwayen* at 405:[4]

> "Although the terms of s. 5(6) [of the *Limitation of Actions Act* 1958 (Vic)] are such that it is susceptible of being read as going to the existence of the jurisdiction of a court to hear and determine an action of the kind described, limitation provisions similarly expressed have not been held to limit the jurisdiction of courts. Instead, they have been held to bar the remedy but not the right and thus create a defence to the action which must be pleaded: *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51 at 58-59; *The Llandovery Castle* [1920] P 119 at 124; *Dismore v Milton* [1938] 3 All ER 762; *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398; *Ketteman Ltd v Hansel Properties Ltd* [1987] AC 189 at 219."

[20] McHugh J held at 497-498:

> "Section 5 is not a condition precedent to the obtaining or maintaining of a statutory right by the plaintiff. Nor is the common law right of the plaintiff to sue the Commonwealth subject to the statutory condition that he commence his action within the period set by s. 5 of the *Limitation Act*. There is, of course, a fundamental difference between a true statute of limitation, such as s. 5, which bars stale claims and a limitation period annexed by a statute to a right which it creates. In the latter class of case, the limitation period will generally be of the essence of the right: see *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488-489. It is not a condition precedent to the right but part of it. However, neither is a

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4 (1990) 170 CLR 394.

> true statute of limitation a condition precedent to the right which it bars. It is a plea in confession and avoidance of that right and not a condition precedent to its exercise. Accordingly, the plaintiff's common law right to bring the present action was not subject to any condition precedent that it be exercised within the period specified by s. 5 of the *Limitation Act*."

[21] The distinction was described in the judgment of Lord Griffiths, referring to an analogous provision, in *Ketteman v Hansel Properties Limited* at 219:[5]

> "I have never in my experience at the Bar or on the Bench heard of an application to amend to plead a limitation defence during the course of the final speeches. Such an application would, in my view, inevitably have been rejected as far too late. A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties. If both parties on this assumption prepare their cases to contest the factual and legal issues arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and a plea of limitation no longer serves its purpose as a procedural bar."

[22] Both respondents in this case elected to rely upon the limitations defence. To overcome that defence, the applicant was obliged to bring an application to extend the limitation period. The applicant has been successful in that application and is entitled in those circumstances to have its costs.

**Fixing of costs – applicant's submissions**

[23] As to the fixing of costs the applicant submitted:

> "Rule 5 requires the Uniform Civil Procedure Rules to be applied with the objective of avoiding undue delay, expense and technically in facilitating the purpose of the Rules. The purpose is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> It is submitted that an order fixing costs would facilitate these purposes. Practice Direction 3 of 2007 provides as follows, and, it is submitted, encourages the fixing of costs where appropriate:
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> 1. Rule 687(2) of the Uniform Civil Procedure Rules provides, in part, that instead of assessed costs, the court may order a

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5 [1987] AC 189.

party to pay to another party 'an amount for costs decided by the court' or 'an amount for costs to be decided in the way the court directs'.

2. This Practice Direction is intended:
   a. to encourage parties to agree on the amount of costs otherwise to be assessed; and
   b. to signal the authority of the court, in an appropriate case, to fix costs, and to ensure parties are in a position to inform that process.

3. a. The court has a broad discretion to fix costs, and will do so where that will avoid undue delay and expense, but only provided the court is confident to fix costs on a reliable basis.
   b. Parties should therefore, at all relevant times in the course of the hearing of a matter, be in a position to inform the court of their realistic estimate of the amount of the recoverable costs, on a standard or indemnity basis, should that party be the beneficiary of a costs order. Where practicable, the estimate should be verified on affidavit.
   c. Preferably parties should not, for this purpose, be put to the expense, and suffer the delay, of preparing a costs statement complying with the UCPR. Any estimate must nevertheless be carefully formulated and realistic.

It is submitted that the fixing of costs would facilitate the expeditious resolution of the principal proceedings against the first and second Respondents, such that the Applicants and their legal representatives are not unduly distracted by the costs assessment procedure."

[24] In this case, however, I am not of the view that the quantum of costs should be fixed. Considerable complexity arises in relation to the extent to which there were common issues across the nine cases litigated together and the extent to which replication of costs will occur within those in which the applicants seek costs.

**Conclusion**

[25] I order the respondents to pay the applicant's costs of and incidental to the application to be assessed.